

**ENTERED**

September 14, 2022

Nathan Ochsner, Clerk

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
MCALLEN DIVISION

FILIBERTO J. GARZA MORENO,

Plaintiff,

VS.

ALLEGIANT TRAVEL COMPANY,  
ALLEGIANT AIR, LLC, and AIRPORT  
TERMINAL SERVICES, INC.,

Defendants.

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CIVIL ACTION NO. 7:21-cv-00247

**OPINION AND ORDER**

The Court now considers “Defendants Allegiant Travel Company and Allegiant Air LLC’s Motion for Partial Summary Judgment,”<sup>1</sup> Plaintiff’s Response to Defendants Allegiant Travel Company’s and Allegiant Air LLC’s Motion for Partial Summary Judgment,”<sup>2</sup> and “Plaintiff’s Unopposed Motion for Leave to File Plaintiff’s Second Amended Original Complaint.”<sup>3</sup> After considering the motions, record, and relevant authorities, the Court **DENIES AS MOOT** Defendants’ motion for partial summary judgment<sup>4</sup> and **GRANTS** Plaintiff’s motion for leave to file amended complaint.<sup>5</sup>

Defendants’ motion for partial summary judgment requests that the Court dismiss Plaintiff’s gross negligence/exemplary damages claim with prejudice.<sup>6</sup> Plaintiff’s response asserts that “Plaintiff no longer desires to prosecute his claim and cause of action for gross negligence and

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<sup>1</sup> Dkt. No. 35.

<sup>2</sup> Dkt. No. 40.

<sup>3</sup> Dkt. No. 39.

<sup>4</sup> Dkt. No. 35.

<sup>5</sup> Dkt. No. 39.

<sup>6</sup> Dkt. No. 35.

exemplary damages against Defendants.”<sup>7</sup> Thus, instead of granting Defendants’ motion for partial dismissal, Plaintiff would ask the Court to grant his unopposed motion requesting leave to file his amended complaint.<sup>8</sup>

Rule 15(a)(2) provides that the Court should freely give leave to amend “when justice so requires.”<sup>9</sup> In determining whether to allow leave to amend a pleading, courts examine whether there was 1) undue delay; 2) bad faith or dilatory motive; 3) repeated failure to cure deficiencies by previous amendments; 4) undue prejudice to the opposing party; and 5) futility of the amendment.<sup>10</sup> In the absence of any of these factors, the Court should freely grant the requested leave.<sup>11</sup> The decision whether to grant leave to amend lies within the Court’s sound discretion.<sup>12</sup>

The Court finds none of the warning factors present here. Plaintiff does not seek amendment in bad faith or with dilatory motive. Amendment here will not result in any significant delay. Moreover, the Court finds Plaintiff’s amendment would not prejudice Defendants, particularly considering Defendants’ lack of opposition. Plaintiff’s amendment would not be futile, as Plaintiff would have the opportunity to file a complaint in conformity with Defendants’ motion for partial summary judgment as well as Plaintiff’s response to that motion.

Accordingly, the Court hereby **GRANTS** Plaintiff’s unopposed motion for leave to file Plaintiff’s second amended original complaint.<sup>13</sup> Plaintiff’s second amended original complaint is considered timely filed as of today’s date and the Clerk of Court is **ORDERED** to enter that

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<sup>7</sup> Dkt. No. 40.

<sup>8</sup> *Id.* at 1.

<sup>9</sup> FED. R. CIV. P. 15(a)(2); see *Lyn-Lea Travel Corp. v. Am. Airlines, Inc.*, 283 F.3d 282, 286 (5th Cir. 2002) (citation omitted) (noting that the language of Rule 15(a) “evinces a bias in favor of granting leave to amend”).

<sup>10</sup> *Smith v. EMC Corp.*, 393 F.3d 590, 595 (5th Cir. 2004) (citing *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 864 (5th Cir. 2003)).

<sup>11</sup> *Foman v. Davis*, 371 U.S. 178, 182 (1962).

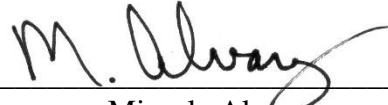
<sup>12</sup> *Smith*, 393 F.3d at 595 (quoting *Quintanilla v. Tex. Television, Inc.*, 139 F.3d 494, 499 (5th Cir. 1998)).

<sup>13</sup> Dkt. No. 39.

complaint<sup>14</sup> as a separate docket entry on the Court's docket. Additionally, Defendants' motion for summary judgment is hereby **DENIED AS MOOT**.<sup>15</sup>

IT IS SO ORDERED.

DONE at McAllen, Texas, this 14th day of September 2022.

A handwritten signature in black ink, appearing to read 'M. Alvarez', is written over a horizontal line.

Micaela Alvarez  
United States District Judge

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<sup>14</sup> Dkt. N0. 39-1.

<sup>15</sup> Dkt. No. 35.